Supreme Court, U. S.
FILED
JUN 16 1975
CLERK

No. 74-1322

In the Supreme Court of the United States

OCTOBER TERM, 1974

STEPHEN A. BODZIN AND TANYA K. BODZIN,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
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The sole question presented is whether petitioner[1] may deduct a portion of the rent paid for his personal apartment residence under Section 162(a) of the Internal Revenue Code of 1954 (26 U.S.C.) because he used one of its rooms to perform employment-related tasks on some evenings and weekends. The court of appeals held that the expense of renting an apartment was a nondeductible personal expense under Section 262 of the Code and not a business expense.

Briefly, the pertinent facts are as follows: During 1967, petitioner was employed as an attorney-adviser in the Interpretative Division of the Office of the Chief Counsel for

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[1]"Petitioner" refers to Stephen A. Bodzin. Tanya K. Bodzin is a party because she filed a joint return with her husband.

the Internal Revenue Service, in Washington, D.C. In that capacity, he reviewed, analyzed, researched and wrote opinions concerning proposed ruling letters and published rulings, and dealt with requests from other divisions in the Chief Counsel's office for advice on various tax matters. Petitioner worked independently, without daily supervision, but was expected to complete his cases with reasonable promptness. He was not required, requested, expected or encouraged to work beyond normal business hours, but sometimes did so in order to meet deadlines, self-imposed or otherwise, and to insure that his work was performed to the best of his abilities (Pet. App. A 2a-4a; Pet. App. B 15a).

In 1967, petitioner, his wife and child lived in an apartment in Alexandria, Virginia. The apartment consisted of a living room, dining room, kitchen, two bedrooms and baths and a study or den. The study was furnished with a desk and chair, bookcases, cabinets, and lamps, and petitioner kept his personal papers, his stamp collection, and his and a portion of his wife's personal library there. Petitioner also kept his personally owned law books in the study. The study was not used to entertain visitors, but was occasionally used by petitioner for personal purposes, such as reconciling his bank statements, paying bills and maintaining his stamp collection (Pet. App. A 4a-5a; Pet. App. B 15a).

Petitioner usually worked in this study two or three evenings a week and for three to five hours on weekends. He worked on cases and other matters assigned to him and also read about current developments in tax law. Petitioner's employer provided him with an office in the Internal Revenue Service building which was always open and available to him. While this office was located only

ten miles from his house, petitioner almost invariably chose to do his overtime work in the apartment den. He worked there both because he found it more convenient and because he thought it was more efficient to work at home. Using the den enabled petitioner to spend more time with his family and to take advantage of his car pool (Pet. App. A 5a-6a; Pet. App. B 15a-16a).

In 1967, petitioner paid a total of $2,100 in rent for his apartment and deducted $100 of this amount as a business expense on his return for that year. On audit, the Commissioner disallowed petitioner's deduction of a portion of his rent as a business expense. In a reviewed decision with four dissents, the Tax Court upheld petitioner's claimed deduction on the ground that use of his den was appropriate and helpful to the performance of his duties as an attorney for the Internal Revenue Service (Pet. App. A 6a-10a).

The court of appeals, however, reversed. It concluded that the rental expense was a personal expense under Section 262 of the Code and not a business expense within Section 162(a). Because of its holding that the deduction was barred by Section 262, the court of appeals found it unnecessary to reach the question whether the expense could be classified as "ordinary and necessary" within the meaning of Section 162(a) (Pet. App. B 14a-18a).

1. Section 161 of the Code states that "[i]n computing taxable income under section 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible)." As this Court observed only last Term in *Commissioner* v. *Idaho Power Co.*, 418 U.S. 1, 17, this provision is a priority-ordering directive foreclosing the deduction of any expense specifically made nondeductible by Sections 261 through 279, even if such an

expense might otherwise fit within the terms of a section authorizing a deduction. Section 262 provides that "no deduction shall be allowed for personal, living, or family expenses." Thus, pursuant to Section 161, any expense which might be arguably deductible as a business expense under Section 162(a), would be nonetheless nondeductible if it were a "personal, living, or family" expense under Section 262.

The undisputed facts of this case demonstrate that petitioner's use of his home study arose solely out of personal considerations. As the court of appeals concluded (Pet. App. B 17a), petitioner performed after-hours work at home solely as a matter of personal choice. Petitioner found working at home more convenient because it permitted him to spend more time with his family and to make greater use of a car pool in commuting to and from work. The fact that petitioner's employer provided him with an office that was always available, that was located near his home, and that was unquestionably adequate for the performance of his overtime work, serves further to demonstrate that petitioner's use of his home study was prompted solely by personal considerations. See Rev. Rul. 62-180, 1962-2 Cum. Bull. 52, 56, *Example* (*4*).

Since it is undisputed that petitioner did not use any part of his personal apartment residence as his place of business (Pet. App. B 17a), the court of appeals correctly concluded that his claimed rental deductions is barred by Section 262. See Treasury Regulations on Income Tax, § 1.262-1(b)(3) (26 C.F.R.).

2. Contrary to petitioner's contention (Pet. 5-6), the decision below does not conflict with *Newi* v. *Commissioner*,

432 F.2d 998 (C.A. 2).[2] There, the taxpayer was an outside salesman of television time for the American Broadcasting Company. He used a study in his apartment for an average of three hours each night to review his day's sales activities, study research materials and ratings, plan the following day's activities, and view the television advertisements on his employer's and its competitors' networks.

In allowing a deduction for the expenses allocable to the taxpayer's home study, the Second Circuit emphasized that viewing television programming was essential to the performance of his duties as a salesman and that the study was the most suitable place he could perform this aspect of his "business."[3] As that court observed with respect to the taxpayer's activities (432 F.2d at 1000), "It is his business to sell television programs in a competitive market. To do this he must endeavor to secure the maximum amount of television information available." Indeed, had the taxpayer in *Newi* attempted to travel to his employer-provided office in the evening, he would have missed much of the evening programming he was required to watch (see *ibid.*).

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[2]In an attempt to show that the Commissioner has been administratively inconsistent in his treatment of home study deductions, petitioner cites (Pet. 9) *Green* v. *Commissioner*, 59 T.C. 456. It is true the Commissioner permitted such a deduction in *Green*. However, the taxpayer in *Green* was a colleague of the taxpayer Newi, and performed the same duties as an outside salesman of television time. Since Green resided within the same appellate venue as Newi (59 T.C. at 457), the Commissioner's concession in *Green* was simply an acknowledgement of the applicability of the Second Circuit's ruling rather than an instance of administrative inconsistency.

[3]Petitioner also argues (Pet. 5-7) that the decision below conflicts with the Eighth Circuit's *per curiam* affirmance in *Dietrich* v. *Commissioner*, 503 F.2d 1379. However, petitioner has confused two different Tax Court cases involving the taxpayer Dietrich. The first case (30 T.C.M. 685) did involve a business expense deduction attributable to the use of Dietrich's home for business purposes, but that decision was not the subject of the appeal to the Eighth Circuit. The Eighth Circuit's *per curiam* affirmance involves only the second case (33 T.C.M. 66), in which the sole question concerned the taxation of a fellowship under Section 117 of the Code.

Thus, the decision in *Newi* turned on its particular facts and is distinguishable. There is no indication that the Second Circuit would uphold a deduction for a part of the rental of a personal apartment residence in this case, where the taxpayer's use of his home for after-hours work was prompted solely by personal considerations.[4]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[4]Petitioner further urges (Pet. 6-8) that there is a conflict with various Tax Court decisions. But a conflict between the Tax Court and the decision below does not warrant resolution by this Court. At all events, the cited Tax Court decisions are not inconsistent with this case. In each of those cases, the employer-provided facilities were either unavailable or unsuitable for the overtime work in question (see Pet. App. B 17a-18a). Thus, the use of the taxpayers' houses for business purposes in those cases arose out of the "exigencies of business." *Commissioner* v. *Flowers*, 326 U.S. 465, 474.